No. 165

RAILWAY EXPRESS AGENCY, INCORPORATED,
Appellant,

vs.

COMMONWEALTH OF VIRGINIA.

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA.

STATEMENT AS TO JURISDICTION

J. H. Mooney,
Thomas R. Gay,
William H. Watkins, Jr.,
H. Merrill Pace,
Counsel for Appellant.

Watkins, Williams, Anderson,
Gay and Mooney,
Of Counsel for Appellant.

INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Opinion below	1
State statute involved	2
Statement of the case	3
Statute sustaining jurisdiction	6
The question is substantial	7
Invalidity under Commerce Clause	8
Appendix "A"—Opinion of Justice Lemuel Franklin Smith of the Supreme Court of Appeals of Virginia	19
Appendix "B"—Article 4 of Title 58 of the Code of Virginia, 1950	27
Appendix "C"—Opinion of Commissioner Catterall of the State Corporation Commission of the Commonwealth of Virginia	31

Table of Cases Cited

Alpha Portland Cement v. *Massachusetts*, 268 U. S. 203	10
American Barge Line Company v. *Koontz*, 68 S.W. 2d 56	15
California State Auto Association Inter-Insurance Bureau v. *Maloney, Insurance Commissioner*, 341 U.S. 105	7
Cities Service Gas Company v. *Peerless Oil and Gas Company, et al.*, 340 U.S. 179	7
Commonwealth of Virginia v. *Baltimore Steam Packet Company*, 193 Va. 55, 68 S. E. 2d 137, 343 U.S. 923	8, 9
Dean Milk Company v. *City of Madison, Wisconsin, et al.*, 340 U.S. 349	7
Freeman v. *Hewit*, 329 U.S. 249	10
Hughes v. *Fetter, et al.*, 341 U.S. 609	7
Joseph v. *Carter and Weeks Company*, 330 U.S. 422	10
Lawrence v. *State Tax Commissioner*, 286 U.S. 276	11
McLeod v. *Dilworth Company*, 322 U.S. 327	10

Page

Memphis Steam Laundry v. *Stone*, 348 U.S. 389 ... 9
Meyer v. *Wells, Fargo and Company*, 223 U.S. 298 ... 16
New Jersey Bell Telephone Company v. *New Jersey*, 280 U.S. 338 ... 14
Niemotko v. *State of Maryland*, 340 U.S. 268 ... 7
Ohio Tax Cases, 232 U.S. 576 ... 15
Ozark Pipe Line Corporation v. *Monier*, 266 U.S. 555 ... 10
Railway Express Agency, Incorporated v. *Commonwealth of Virginia*, 194 Va. 757, 75 S. E. 2d 61 ... 2
Railway Express Agency, Incorporated v. *Commonwealth of Virginia*, 153 Va. 498, 282 U.S. 440 ... 20
Richfield Oil Corporation v. *State Board of Equalization*, 329 U.S. 69 ... 7
Spector Motor Service, Incorporated v. *O'Connor*, 340 U.S. 602 ... 5
Storaasli v. *Minnesota*, 283 U.S. 59 ... 11
U. S. Glue Company v. *Oak Creek*, 247 U.S. 321 ... 14
Virginia, The Commonwealth of v. *Baltimore Steam Packet Company*, 193 Va. 55, 68 S.E. 2d 137, 343 U.S. 923 ... 8, 9
Wagner v. *City of Covington*, 251 U.S. 95 ... 10
Western Maryland Railway Company v. *Rogan*, 340 U.S. 520 ... 7
Wisconsin v. *J. C. Penney Company*, 311 U. S. 435 ... 11

STATUTES AND OTHER AUTHORITIES CITED

Acts of the General Assembly of Virginia, 1948, Chapter 466, Section 219(d), Page 924 ... 2
Acts of the General Assembly of Virginia, 1952, Chapter 486, Page 779 ... 16

Code of Virginia, 1950, Title 58:
Article 4:
Section 58-546 ... 12
Section 58-547 ... 2, 3, 4, 5, 6, 7, 8
Section 58-553 ... 12
Section 58-575 ... 8
Article 7, Chapter 12 ... 16
Sections 58-570 thru 58-574 ... 16

Page

Constitution of the United States, Article I, Section 8, Paragraph 3 5
Constitution of Virginia, Section 171 11
Rules of the Supreme Court of Appeals of Virginia, Rule 5.11 6
United States Code, Title 28, Section 1257(2) 7

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 163

RAILWAY EXPRESS AGENCY, INCORPORATED,
Appellant,

vs.

COMMONWEALTH OF VIRGINIA

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, Appellant submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the final judgment of the Supreme Court of Appeals of Virginia in this cause.

Opinion Below

The opinion of the Supreme Court of Appeals of Virginia here appealed from was dated and entered March 9,

1953, and is reported in 194 Va. 757, and 75 S. E. 2d 61. A copy of the opinion is attached hereto as Appendix A, page 24.

State Statute Involved

The statute of the State of Virginia, the validity of which is involved, is a portion of an act of the General Assembly of Virginia, approved April 2, 1948 (Acts of the General Assembly of Virginia, 1948, Chapter 466, Section 219(d), page 924; Section 58-547 of the Code of Virginia, 1950).[1] It is an amendment and re-enactment of the annual license tax based upon gross receipts which has been imposed on express companies by the State of Virginia for many years. The statute, herein referred to as "§58-547", provides in full as follows:

> "§58-547. Annual license tax.—Every such company, for the privilege of doing business in this State, in addition to the annual registration fee and the property tax as herein provided, shall pay an annual license tax as follows:
>
> "The tax shall be equal to two and three-twentieths per centum upon the gross receipts from operations of such companies and each of them within this State. When such companies are operating partly within and partly without this State, the gross receipts within this State shall be deemed to be all receipts on business beginning and ending within this State and all receipts earned in this State on business passing through, into or out of this State; provided, unless otherwise clearly shown, such last-mentioned receipts shall be deemed to be that portion of the total receipts from such business which the entire mileage over which such business is done bears to the mileage operated within this State.
>
> "The provisions of this section shall apply to the

[1] Section 219 of Chapter 466 of the Acts of 1948 appears as Article 4 of Title 58 of the Code of Virginia, 1950. The full text of Article 4 is attached hereto as Appendix B.

assessment for the tax year nineteen hundred forty-nine and annually thereafter, unless otherwise provided by law."

Statement of the Case

Appellant operates interstate between all the forty-eight states of the United States and the District of Columbia and *operates intrastate within all of the states except Virginia.* The business of Appellant in Virginia has been confined solely to interstate business since the State Corporation Commission denied it authority to do an intrastate business by order dated April 8, 1929, in Case No. 3900, reported at page 252 of the annual report of the Commission for 1929. This decision was sustained by the Supreme Court of Appeals of Virginia, 153 Va. 498 (1929) and by the Supreme Court of the United States, 282 U. S. 440 (1931). Following that decision, Appellant organized a wholly owned subsidiary in Virginia, Railway Express Agency, Incorporated, of Virginia, to conduct only an express transportation business in intrastate commerce in this state.

Since its organization, the Virginia Company has reported to the State of Virginia, has been assessed with and has paid annually all taxes on property owned by it and money used and employed by it in *intrastate* commerce in Virginia as well as the license tax imposed under §58-547, for the privilege of doing business in Virginia, based on its gross receipts from operations in this state.

Since the organization of its Virginia subsidiary, Appellant has made the requisite reports to the State of Virginia, has been assessed with and has paid annually all taxes on property and money used by it in Virginia all of which was in *interstate* commerce and, under protest, it has likewise made the requisite report, has been assessed with and has paid annually the license tax imposed under § 58-547 *for the privilege* of doing an interstate business in Virginia.

Although this license tax ostensibly has been assessed pursuant to §58-547 or its antecedent sections of the Code, it has in fact been assessed pursuant to informal understandings resulting from frequent conferences and discussions with the State Corporation Commission and its staff. The various methods and formulae employed from time to time to determine the gross receipts of Appellant subject to assessment in Virginia and the amount of license tax annually to be imposed thereon have not been uniform and admittedly have not met the requirements of §58-547.

Prior to 1942 the gross receipts of Appellant taxable in Virginia were determined by applying to the mileage of lines operated in the state an arbitrary or fixed amount per mile, which was varied from year to year. In 1942 an understanding, which did not purport to meet the requirements of the antecedent of §58-547 but was a substitute therefor, was reached between the State Corporation Commission's staff and the then General Counsel of Appellant which has since served as a basis for the assessment of this license tax. The various assessments annually made against Appellant since 1942 pursuant to this understanding have been accepted by the company and the tax paid thereon pursuant thereto under the following form of protest:

> "This company does an interstate business through, into, and out of Virginia but it has no way of ascertaining how much of the receipts on that business is earned in Virginia.
>
> "The business passing through, into or out of this state is interstate business and is not subject to taxation by the state. It is understood that this report is intended to be used as the basis for levying a tax under Section 58-547 of the Code of Virginia, which prescribes a license tax for the privilege of doing business in Virginia, and which is imposed upon gross receipts. The $—— reported as 'All receipts earned in Virginia on business passing through, into or out of this state' is computed in accordance with an understanding had

with the State Corporation Commission of Virginia, and is made without prejudice to the protest of this Company against any tax being levied upon, or measured by such receipts. Protestant cannot, lawfully, be required to pay a license tax for the privilege of doing an interstate business in Virginia, as such tax cannot, legally, be imposed upon gross receipts derived exclusively from interstate commerce, and the tax if applied to the interstate receipts of protestant, would violate the commerce clause of the Constitution of the United States, and therefore is beyond the legal authority of the State of Virginia to levy."

Despite these annual protests, no refunds were sought by Appellant until the United States Supreme Court decided the case of *Spector Motor Service, Inc.*, v. *O'Connor*, 340 U. S. 602 (1951), holding that a state tax *on the privilege of doing solely an interstate business* in a state was unconstitutional, being in violation of the Commerce Clause of the Federal Constitution. Following the Supreme Court's decision in the *Spector* case, Appellant sought refunds for taxes paid pursuant to §58-547 for the years 1950 and 1951 in the amounts of $70,665.68, and $66,454.71, respectively.

The petitions for refund filed with the State Corporation Commission of Virginia raised the single question of the repugnancy of §58-547 to the Commerce Clause of the Constitution of the United States by alleging that §58-547 was "unconstitutional, null and void in that it is sought to be imposed upon the right and privilege of your petitioner to do an interstate business in this State, and constitutes a direct burden upon such commerce and a tax upon your petitioner for the privilege of engaging therein, in contravention of the provision of Article I, Section 8, Paragraph 3, of the Constitution of the United States, conferring upon the Congress thereof the sole and exclusive power to regulate commerce among the several states." [2]

[2] Paragraph 6 of 1950 petition and paragraph 7 of 1951 petition.

The Commission dismissed the petition for refund of the 1950 tax on a jurisdictional point not pertinent to this appeal. With respect to the petition for the 1951 tax refund, the Commission held that §58-547 was a property tax on the going concern value of express companies and not a license or excise tax and was, therefore, not violative of the commerce clause of the Constitution of the United States when applied to Appellant.[3]

Appellant appealed the decision of the Commission with respect to both petitions for refund to the Supreme Court of Appeals of Virginia. This issue as to the invalidity of the tax was raised on appeal in the assignment of errors and statement of questions involved set forth in Appellant's opening brief as required by Rule 5.11 of the Rules of the Supreme Court of Appeals of Virginia.

The Supreme Court of Appeals of Virginia in its opinion dated and issued March 9, 1953, held (a) that §58-547 was not repugnant to the Commerce Clause of the Federal Constitution since it imposed a property tax on Appellant's going concern value, and not a tax on the privilege of conducting an express business in interstate commerce.[4] The court's decision was applicable to the petitions for refund for both 1950 and 1951, thereby rendering unnecessary a decision on the jurisdictional question on which the Commission based its adverse decision with respect to the petition for the 1950 refund.

Appellant is appealing from the decision of the Virginia Court on the constitutional issue stated above.

Statute Sustaining Jurisdiction

The judgment of the Virginia Court was entered on March 9, 1953. A petition for appeal is presented herewith,

---

[3] The opinion of the Commission is attached hereto as Appendix C; see p. 31.

[4] See page 22 (Appendix A).

to-wit, on May 22nd, 1953. The jurisdiction of the Supreme Court to review this decision by appeal is conferred by Section 1257(2) of the Judicial Code and Judiciary (28 U. S. C. 1257(2)) as the decision was rendered by the highest court of the State of Virginia in which a decision could be had and there was drawn in question the validity of a statute of the State of Virginia, § 58-547, on the grounds of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity.

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment by appeal in this cause: *Richfield Oil Corporation* v. *State Board of Equalization*, 329 U. S. 69 (1946); *Cities Service Gas Co.* v. *Peerless Oil & Gas Co., et al.*, 340 U. S. 179 (1950); *Dean Milk Co.* v. *City of Madison, Wis., et al.*, 340 U. S. 349 (1951); *Niemotko* v. *State of Maryland*, 340 U. S. 268 (1951); *Western Maryland Railway Co.* v. *Rogan*, 340 U. S. 520 (1951); *California State Auto. Ass'n Inter-Insurance Bureau* v. *Maloney, Inc. Comm'r*, 341 U. S. 105 (1951); and *Hughes* v. *Fetter, et al.*, 341 U. S. 609 (1951).

The Question Is Substantial

The federal question presented to the State Corporation Commission and the Supreme Court of Appeals of Virginia and on this appeal is:

The validity under the Commerce Clause of the Constitution of the United States of a state license statute which provides that every express company "for the privilege of doing business in this State, in addition to the annual registration fee and the property tax as herein provided, shall pay an annual license tax" measured by a percentage of the gross receipts from operations of such companies within the State *when applied to an express company doing solely an interstate business in such state.*

Invalidity Under Commerce Clause

The United States Supreme Court in *Spector Motor Service, Inc.* v. *O'Connor, supra,* held that a Connecticut income tax assessed against an interstate motor carrier, *doing no intrastate business in Connecticut* "for the privilege of carrying on or doing business within the State," was invalid under the Commerce Clause of the Constitution of the United States because the tax was on "the privilege of engaging in interstate commerce".

The Virginia gross receipts tax on express companies imposed by § 58-547 is by its terms "an annual license tax" assessed "for the privilege of doing business in this State, in addition to the annual registration fee and the property tax as herein provided". *Appellant is engaged solely in interstate commerce in Virginia.* The Virginia Corporation Commission and the Supreme Court of Appeals so decided.[5] As pointed out above, the intrastate express business is conducted by a wholly-owned subsidiary which is assessed with and pays the license tax imposed by § 58-547 upon its gross receipts.

With the exception that the Virginia tax is imposed on gross receipts while the Connecticut tax is on net income, the situation in the *Spector* case and in the instant case are substantially identical. After the final decision in the *Spector* case, the Virginia Commission and the Supreme Court of Appeals undertook to avoid the consequences of that decision by attributing to § 58-547 the label of a property tax rather than that of a license tax as it had been designated by the General Assembly and treated by the taxing officials for many years.[6]

---

[5] See p. 48 (Appendix C), and p. 20 (Appendix A).

[6] An almost identical tax on steamship and other water carriers (§ 58-575 of the Virginia Code, 1950) was likewise considered a privilege or license tax for many years until the recent decision of the Supreme Court of Appeals of Virginia in *Commonwealth* v. *Balto. Steam Packet Co.*, 193

It is manifest from the foregoing that a substantial Federal question is here raised concerning the protection afforded interstate commerce by the Commerce Clause. Unless the error of the Virginia court is promptly corrected, the courts and legislatures of the several states are free fully to evade the ruling of the *Spector* case and place direct burdens on interstate commerce simply by changing the names of existing privileges taxes or giving other names to new privilege taxes. This case sets the pattern unless reversed by the Supreme Court. A question of public importance national in scope affecting the power of state legislatures and courts over interstate commerce is thus presented.

The free flow of commerce across state lines is a vital and indispensable part of the economic life and political existence of our country. The lack of power to keep the channels of interstate commerce open was one of the principal reasons for the adoption of our Constitution. In the *Spector* case, the Supreme Court was only continuing its consistent practice of enforcing the protection afforded to interstate commerce by the Commerce Clause which the Court has done on innumerable occasions down through the years. The following cases are illustrative of the protection thus afforded business that was exclusively *interstate* in character from state taxes upon the privilege of conducting such a business: *Memphis Steam Laundry* v. *Stone*, 348 U. S. 389 (1952) (flat tax per truck, which state court held to be privilege tax, held invalid when assessed against interstate

---

Va. 55, 68 S. E. (2d) 137 (1951), reversing the decision of the Corporation Commission holding that such tax was a privilege tax. The Virginia Court held the tax to be a property tax and the Supreme Court dismissed the appeal on April 21, 1952, 343 U. S. 923, presumably on the ground that the taxpayers in that case were involved in intrastate business in Virginia, thus clearly distinguishing the facts from those obtaining in the *Spector* case and in the instant case where no intrastate business was done by the taxpayers.

laundry business); *Spector Motor Service, Inc.* v. *O'Connor, supra* (tax assessed against interstate motor carrier, which state court held to be privilege tax, held invalid when measured by the portion of net income attributable to business within the state); *Joseph* v. *Carter & Weeks Co.*, 330 U. S. 422 (1947) (privilege tax measured by gross receipts held invalid when assessed against interstate stevedoring company); *Freeman* v. *Hewit*, 329 U. S. 249 (1946) (Gross income tax on sale of securities in interstate commerce by resident held invalid); *McLeod* v. *Dilworth Co.*, 322 U. S. 327 (1944) (state sales tax levied on foreign corporation doing exclusively interstate business in state held invalid); *Ozark Pipe Line Corp.* v. *Monier*, 266 U. S. 555 (1925) (tax assessed against interstate pipe line company, which state court held to be a privilege tax, held invalid when measured by percentage of capital stock and surplus); and *Alpha Portland Cement* v. *Massachusetts*, 268 U. S. 203 (1925) (tax assessed against foreign corporation which state court held was excise tax, held invalid when measured by percentages of "corporate excess" and net income).

Unless the Virginia Court is correct in labeling §58-547 a property tax it is clearly invalid under these decisions. Where constitutional issues are involved, the Supreme Court is not bound by the label placed upon a state statute by a lower court or a legislative body or by the descriptive words which such a court or legislative body has applied to the statute but decides for itself the character of the tax.

In *Wagner* v. *City of Covington*, 251 U. S. 95 (1919), which went up on a writ of error to the Court of Appeals of Kentucky, a license ordinance was held valid as applicable to peddlers despite prior decisions of the Kentucky Court that the type of activity in question did not constitute peddling. The Supreme Court stated that "The

state court could not render valid, by misdescribing it, a tax law which in substance and effect was repugnant to the Federal Constitution; neither can it render unconstitutional a tax that in its actual effect violates no constitutional provision by inaccurately defining it" (p. 102).

In *Storaasli* v. *Minnesota*, 283 U. S. 59 (1931) on appeal from the Supreme Court of Minnesota, a motor vehicle registration tax claimed to be a property tax, held by state court to be "both a property tax and a privilege tax" was held by the United States Supreme Court to be a privilege tax. The Supreme Court stated that it "decides for itself the character of the tax, and whether as applied to the appellant it affects his constitutional rights" (p. 62).

In *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435 (1940), on certiorari to the Supreme Court of Wisconsin, the United States Supreme Court stated "But the descriptive pigeonhole into which a state court puts a tax is of no moment in considering the constitutional significance of the exaction" (p. 443).

See also *Lawrence* v. *State Tax Commissioner*, 286 U. S. 276 (1932); *McLeod* v. *Dilworth Co.*, *supra*.

An analysis of §58-547 in the light of the entire scheme of taxation of express companies by the General Assembly of Virginia as set forth in Article 4 of Title 58 of the Virginia Code, 1950,[7] establishes conclusively that the tax imposed by that section is a privilege tax and not a property tax, in view of Section 171 of the Constitution of Virginia which provides that "No State property tax for state purposes shall be levied on real estate or taxable personal property, except the rolling stock of public service corporations. Real estate and taxable personal property, except the rolling stock of public service corporations, are hereby segregated for, and made subject to, local taxation only."

[7] See Appendix B, p. 28.

The *first* section of Article 4 of Title 58 of the Code (§ 58-546 which is captioned "Taxes on *property* of Express Companies"), provides that every express company shall "pay to the *State* and to the several *counties, cities and towns,* of the State, wherein they may have taxable properties located, the taxes levied on such *property* as follows:". The statute then lists the rates of the taxes payable to the *State* on "*intangible* personal property" and "*money*" and, following the mandate of the Constitution, provides for local levies on "real estate and tangible personal property" of express companies. Thus in the *first* section of Article 4, the General Assembly has provided a comprehensive plan for the taxation of all types of *property* which express companies normally employ in the operation of their business, i.e., money, *intangible personal property,* real estate, and tangible personal property.

The *second* section of Article 4 is § 58-547, which as indicated above, is captioned "Annual license tax." Its opening provision is as follows:

> "Every such company, for the privilege of doing business in this State, *in addition to the annual registration fee and the property tax* as herein provided, shall pay *an annual license tax* as follows:" (Italics supplied.)

Then follows the rate of tax and a formula for apportioning gross receipts when interstate business in involved. It is significant that the tax imposed by the *second* section of the Article is in *addition* to "the property tax" imposed by the *first* section, which specifically includes the state tax on "intangible personal property."

The remaining provisions of the Article are largely administrative in nature and not pertinent here with the exception of the *eighth* section (§ 58-553), which provides that "the amount of *taxes* and *licenses* imposed by this article

and authorized to be imposed shall be *in lieu* of all other *taxes* and *licenses*, State, county and municipal, upon all the *property*, franchises and privileges of such companies", except motor vehicle licenses and fuel taxes.

It is manifest that it was the intention of the General Assembly in enacting and re-enacting this statute since 1915, to levy a *property* tax on the money, on the tangible *and intangible personal property* and on the real estate of express companies and, in addition, *to tax by means of an excise tax the privilege of doing business in this State.* Indeed, the privilege tax imposed by § 58-547 is expressly made "in *addition* to the annual registration fee and the *property tax*" provided for in the same article. If this excise tax is "in addition" to the property tax imposed by § 58-546 and, together with such property taxes and the annual registration fee are "in lieu of all other taxes and licenses", a decision that it is a form of *property* tax rather than a *license* tax imposed *for the privilege of using that property in the conduct of an express business in Virginia is clearly arbitrary and in direct conflict with the obvious intention of the General Assembly.*

The tax imposed by § 58-547 is also not a property tax for the even more significant reason that the *property* of express companies is not the *subject* of the tax. Under other specific provisions of Article 4 express companies pay a separate local tax on their real estate and on their *tangible* personal property and a *separate* tax to the State on their money and on their *intangible personal property.* The tax imposed by § 58-547 is measured by the *gross* receipts of express companies derived from intrastate business done in Virginia and interstate business apportioned to Virginia. *The tax is thus made proportionate to the extent that the privilege of carrying on an express business in Virginia is exercised and is not related to the value (net profits) pro-*

duced by the exercise of that privilege. The tax is on the privilege itself and nothing else. This is true for the reason that the tax must be paid regardless of whether the operations of an express company produce *value* by operating at a profit, or produce no value by operating at a loss. If this were a tax on the value produced by the exercise of the privilege, as the Commission and the Virginia Court decided, it would have to be levied on the *net* profits and not on the *gross* receipts because it is only the earnings after expenses and other charges and not gross receipts, *that is the measure of the value of the property derived from the exercise of the privilege.*

The Supreme Court in *U. S. Glue Co.* v. *Oak Creek*, 247 U. S. 321 (1918), discussed this significant difference as follows:

> "The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large." (pp. 328-329)

There are numerous cases from other states in which taxes on *gross* receipts and similar taxes on express companies and carriers of persons and property have been held to be *privilege* taxes, rather than *property* taxes.

In *New Jersey Bell Telephone Co.* v. *New Jersey*, 280

U. S. 338 (1930), a telephone company, part of the business of which was in interstate and foreign commerce, was taxed *ad valorem* on its real and personal property and was subjected to a franchise tax of 5% of the gross receipts apportioned to New Jersey. The statute called the tax a *franchise* or privilege tax and the state sought to support it as a tax on *property* represented by the value of the company's franchise. The court held that it was not a property tax:

> "We think it very plain that the exaction is not a tax on property nor in substitution for or in lieu of a property tax. Within the rule heretofore applied in this Court the exaction is a direct tax on gross receipts derived from appellant's interstate commerce and, as to that part at least, is void. Philadelphia Steamship Co. *v.* Pennsylvania, 122 U. S. 326, 345. Galveston, H. & S. A. R. Co. *v.* Texas, supra, 227. Meyer *v.* Wells, Fargo & Co., 223 U. S. 298. U. S. Express Co. *v.* Minnesota, 223 U. S. 335. Crew Levick Co. *v.* Pennsylvania, 245 U. S. 292, 295, 297. Cudahy Packing Co. *v.* Minnesota, 246 U. S. 450. U. S. Glue Co. *v.* Oak Creek, 247 U. S. 321, 329. Pullman Co. *v.* Richardson, supra." (p. 349)

Of especial significance is *American Barge Line Co.* v. *Koontz*, 68 S. W. (2d) 56 (W. Va. 1951), in which the Supreme Court of that state held that an annual *privilege* tax based on *gross* income from the business of transporting passengers and freight by steamboat was clearly a *privilege* tax on interstate commerce in contravention of the Commerce Clause of the Federal Constitution. This case represents the reverse of the conclusions of the Supreme Court of Appeals of Virginia in the case at bar and so presents a conflict between the respective Supreme Courts of the two states which should be resolved by this Court so that uniformity of taxation will be achieved.

In *Ohio Tax Cases*, 232 U. S. 576 (1914), the Supreme

Court held that a tax on gross intrastate earnings of railway companies, in addition to the taxes on their property, was a *privilege* or *occupation* tax and not a *property* tax, and in *Meyer* v. *Wells, Fargo & Co.*, 223 U. S. 298 (1912), a gross revenue tax on public service corporations, including express companies, was held not to be a tax upon the property of express companies.

Thus the authorities fully support the position that the tax imposed by §58-547 is a *privilege* tax and not a *property* tax.

Further evidence of the intention of the General Assembly of Virginia that §58-547 is a tax on the privilege of doing business in Virginia is the subsequent legislative history of the license tax imposed by §58-575 on the gross receipts of steamships and other water carriers considered in *Commonwealth* v. *Balto. Steam Packet Company, supra.*

The *Baltimore Steam Packet Company* case was decided December 3, 1951. The General Assembly met in January, 1952, and immediately amended §58-575 of the Code, relating to license taxes upon steamship and other water carriers, by providing that such taxes should be measured *only* by their gross receipts derived from *intrastate* commerce (Acts 1952, Chap. 486, page 779). There is nothing whatever in this enactment indicating a legislative purpose to impose a *property* tax determined by a certain percentage of the gross receipts of such companies. On the contrary, the legislature again re-enacted the tax as "an annual license tax" and declared it to be "in *addition* to the annual registration fee and *property* tax" imposed upon such companies by the preceding sections (§58-570 to §58-574 of Article 7, Chap. 12) of the Code. The foregoing action of the legislature would alone justify this Honorable Court in restoring to the gross receipts tax imposed upon such companies the meaning traditionally accorded

to the language of §58-575, and thus decide that that language correctly describes the incidence of the tax as a *license* and not a *property* tax upon such companies.

The 1952 amendment of §58-575 is also highly significant in the light of the history of the administration by the State Corporation Commission of the tax imposed by that section upon steamship companies. Such a tax was first enacted in 1915 but the Commission had never taxed water carriers on gross receipts derived from *interstate* business until 1949 because of an opinion of the Attorney General of the Commonwealth, given shortly after the statute was enacted, *that to do so would be unconstitutional.*[8] Thus the *license* tax on this class of companies (§58-575) was re-enacted by the General Assembly from time to time since 1915 *with full knowledge that it was the practice of the Commission not to impose the tax on the gross receipts of such companies derived from interstate business.* Then, immediately after the tax was first assessed in 1949 upon gross receipts derived from interstate commerce and immediately after the Supreme Court of Appeals of Virginia held that the tax as so applied was constitutional, the General Assembly let the Court and the Commission know *that it was its intention that the tax should not be imposed upon gross receipts derived from interstate commerce in Virginia.* If it had been intended by the legislature that the tax was upon the *property* of the companies affected, there would have been no occasion for such a change in the law.

Appellant respectfully submits, therefore, that the action of the General Assembly in amending § 58-575 subsequent to the decision by the Virginia Court in the *Baltimore Steam Packet Company* case definitely establishes the legislative intent as to the nature of that tax as a *privilege*

[8] See Opinion of Supreme Court of Appeals of Virginia in *Commonwealth* v. *Balto. Steam Packet Co., supra.*

rather than a *property* tax. If there was any intention on the part of the General Assembly that such a tax be a property tax, there could be no basis in reason for distinguishing between such "property" as might be derived from intrastate commerce and that produced by interstate commerce.

It is respectfully submitted that (a) a review of the entire scheme of taxation of express companies in Virginia, (b) the clear language of §58-547, (c) the interpretation given this and similar statutes for many years by the state taxing officials, (d) the recent action of the Virginia General Assembly with respect to the similar gross receipts tax on steamship and other water carriers, and (e) the decisions of courts in many other jurisdictions construing similar statutes, all fully support the position that §58-547 is a *privilege* tax and not a property tax.

The decision of the Virginia Court has failed to recognize the limitations placed by the Commerce Clause on the power of states to tax interstate commerce and has permitted a direct burden on interstate commerce by misdescribing §58-547 as a property tax. There is no question as to Appellant being engaged solely and exclusively in interstate commerce in Virginia and we believe that the question presented by the appeal is substantial and of considerable public importance, fully justifying a review by the Supreme Court.

Respectfully submitted,

J. H. Mooers,
Thomas B. Gay,
William H. Waldrop, Jr.,
H. Merrill Pasco,
Counsel for Appellant.

Hunton, Williams, Anderson, Gay and Mooers,
Of Counsel for Appellant.

APPENDIX "A"

IN THE SUPREME COURT OF APPEALS OF VIRGINIA

RAILWAY EXPRESS AGENCY, INC.,

v.

COMMONWEALTH OF VIRGINIA

Opinion by Justice Lemuel Franklin Smith, Richmond, Va. March 9, 1953.

Appeal from an Order of the State Corporation Commission

The appellant, Railway Express Agency, Incorporated, filed two applications with the State Corporation Commission seeking the correction of assessments of State taxes made against it by the Commission and the refund of taxes paid for 1950 of $70,665.68 and for 1951 of $66,454.71, which taxes were measured by gross receipts from business done in Virginia under the provisions of Code, §58-547.[9] The applications were made on the ground that the assessments were invalid, because they constituted a burden on inter-

[9] "§ 58-547. Annual license tax.—Every such company, [express company] for the privilege of doing business in this State, in addition to the annual registration fee and the property tax as herein provided, shall pay an annual license tax as follows:

"The tax shall be equal to two and three-twentieths per centum upon the gross receipts from operations of such companies and each of them within and partly without this State, the gross receipts within this State shall be deemed to be all receipts on business beginning and ending within this State and all receipts earned in this State on business passing through, into or out of this State; provided, unless otherwise clearly shown, such last-mentioned receipts shall be deemed to be that portion of the total receipts from such business which the entire mileage over which such business is done bears to the mileage operated within this State.

"The provisions of this section shall apply to the assessment for the tax year nineteen hundred forty-nine and annually thereafter, unless otherwise provided by law. (1919, p. 69; 1926, p. 955; 1928, p. 150; Tax Code, § 219; 1948, p. 924.)"

state commerce in violation of the Commerce Clause of the Federal Constitution, art. 1, §8, cl. 3.

The appellant contends that §58-547 imposes a license tax upon the privilege of carrying on a business exclusively interstate in character and, therefore, is violative of the Federal Constitution; that the apportionment formula provided in §58-547 is invalid; and that, if the tax assessed under §58-547 is a property tax, the appellant has no going concern value on which such a tax could lawfully be levied.

Railway Express Agency, Incorporated, a Delaware corporation, is engaged in the handling and transportation of goods, wares and merchandise in express service in both interstate and intrastate commerce in the District of Columbia and in all the States of the Union except Virginia, where it does solely an interstate business. Its intrastate express business in this State is carried on by a wholly-owned subsidiary, Railway Express Agency, Incorporated, of Virginia, a Virginia corporation, organized on October 20, 1931, following the affirmance by this court [10] of an order of the State Corporation Commission which denied the appellant the authority to do an intrastate express business in this State.

The application for correction of assessment and refund of taxes paid for the year 1950 was dismissed by the Commission, because it was not filed within the time prescribed by Code, §58-672, the Commission therefore being without jurisdiction to grant the relief requested. The appellant contended before the Commission, as it does here, that Code, §58-1122 provides an alternative procedure under the terms of which its application was filed within the time provided.

It is not, however, necessary for us to decide whether the petition was timely filed; for even if we assume that the appellant has proceeded correctly under a proper statute, it is not entitled to the relief sought for the reasons hereinafter stated.

The Commission also denied the relief sought in the case of the 1951 assessment, holding that its decision was gov-

[10] *Ry. Ex. Agy.* v. *Commonwealth*, 153 Va. 498, 150 S. E. 419, *aff'd*, 282 U. S. 440, 51 S. Ct. 201, 75 L. ed., 450.

erned by *Commonwealth* v. *Balto. Steam Packet Co.*, 193 Va. 55, 68 S. E. (2d) 137, *app'l dismissed*, 343 U. S. 923, 72 S. Ct. 763, 72 S. Ct. 764, 96 L. ed. 1335.

The *Balto. Steam Packet* case arose out of appeals by the Commonwealth of Virginia from two adverse decisions of the State Corporation Commission which held invalid the State taxes assessed under the provisions of Code, §58-575 against two steamship companies, which taxes were measured by gross receipts from interstate business done in Virginia. The steamship companies were engaged in both interstate and intrastate commerce, although their intrastate commerce produced only a small fraction of their total revenue. The principal issue in the case centered on the taxpayers' contention that the taxes assessed on receipts from interstate commerce apportioned to business done in this State was a violation of the Commerce Clause. The steamship companies argued that the tax was an annual license tax levied on their gross receipts for the privilege of doing an interstate business in this State and they pointed to the language of §58-575 which did, at that time, denominate the tax an annual license "for the privilege of doing business in this State."

After discussing the pertinent decisions of the Supreme Court of the United States dealing with the very controversial subject of State taxation as a burden on interstate commerce, we decided in the *Balto. Steam Packet* case that if a tax "is in substance and effect a fairly apportioned tax on property, it is valid." In answer to the question then presented—What kind of tax is levied by §58-575?—we pointed out in the course of our opinion that it is the operation of the statute and not its descriptive label that governs the character of a tax and concluded that §58-575 provides for a property tax, not a license tax for the privilege of doing business, in these words: "In its derivation and substance it is a tax on an element of value of the physical properties not reached by the tax levied by the localities, but reserved to the State and not otherwise taxed." 193 Va. at p. 70. This holding was based on analysis of the numerous decisions of the Supreme Court of the United States discussed in the opinion which recog-

nize the principle that the going concern value of a business is taxable although the individual physical properties from which it arises are used in interstate commerce.

The appellant filed a brief as *amicus curiae* in the *Balto. Steam Packet* case wherein it vigorously upheld the contention of the taxpayers that the tax levied under §58-575 was invalid. At the oral argument of the case at bar it conceded that this case is on all fours with the case involving the water carriers except that the appellant here does no intrastate business.

In *Spector Motor Service* v. *O'Connor*, 340 U. S. 602, 71 St. Ct. 508, 95 L. ed. 573, the rule is laid down that a State tax upon the privilege of carrying on a business exclusively interstate in character violates the Commerce Clause no matter how fairly it is apportioned to business done within the State.

[1] However, the tax levied under the provisions of Code, §58-547 is not a tax upon the privilege of carrying on a business exclusively interstate in character. Like the tax imposed by Code, §58-575, which we considered in the *Balto. Steam Packet* case, it is an intangible property tax based on the augmentation in value of the physical assets of the taxpayer arising out of the use of these physical assets as a unit of commerce; this added value being measured by the volume of business done in this State. The physical assets of a taxpayer are said to have a dual value when used in an established going concern; a dead value, or the value of the bare tangible properties themselves; and a live value, or the intangible value which is created by the concerted utilization of the congeries of unrelated items. See *Galveston, etc., R. Co.* v. *Texas*, 210 U. S. 217, 28 S. Ct. 638, 52 L. ed. 1031; *Richmond* v. *Commonwealth*, 188 Va. 600, 50 S. E. (2d) 654.

[2] The appellant argues that the action of the General Assembly in amending §58-575 (applicable to steamship and other water carriers) the month following the decision of this court in the *Balto. Steam Packet* case definitely established the legislative intent to impose that tax as a privilege rather than as a property tax. See Acts of 1952, ch. 486, p. 780. The amendment of §58-575 deleted the words

"for the privilege of doing business in this State," and then went on to make the tax applicable only to gross receipts derived from intrastate business. We do not see any indication in this amendment of a legislative intent to change the nature of the tax as defined by this court immediately prior to the amendment. For reasons sufficient unto itself, perhaps to encourage the development of the harbors and waterways of Virginia or because for many years the tax on interstate receipts had not been enforced, the legislature changed the law as it applied to steamship and other water carriers, but made no changes in the almost identical statute which applies to express companies. And this was done notwithstanding the fact that the legislature had before it the decision in the *Balto. Steam Packet* case which stated in the following language that the rule of the case as regards steamship and other water carriers would also apply to express companies:

"In the case of steamship companies (and also express companies) the tax is denominated a license tax, and the requirement is that every such company shall pay it 'for the privilege of doing business in this State, in addition to the annual registration fee and property tax.' But what it is called is not necessarily what it is" 193 Va. at p. 68.

Furthermore, says the appellant, if the gross receipts taxes imposed by § 58-547 (express companies) and § 58-575 (steamship and other water carriers) are in fact property taxes, then § 58-575, as amended in 1952, fails to tax the going concern value which is produced by the interstate business of steamship and other water carriers and consequently is in conflict with § 168 of the Constitution of Virginia which provides that "All property, except as hereinafter provided, shall be taxed"; there being no subsequent provision of the Constitution exempting the property of steamship and other carriers. If, on the other hand, continues the appellant, these taxes are privilege taxes, the 1952 amendment of § 58-575 results in no unlawful attempt to exempt property from taxation.

Of course, we do not have before us the question whether § 58-575 violates § 168 of the Constitution, but merely the

argument that if § 58-547, and § 58-575, as amended, impose property taxes, the latter is in conflict with § 168 of the Constitution. When we are confronted with the question of the constitutionality of the 1952 amendment of § 58-575 we will deal with it.

[3] Continuing its argument as to the nature of the tax imposed by § 58-547, the appellant contends that if the taxes levied by the State on the gross receipts of public service corporations are property taxes on the going concern value of such taxpayers rather than privilege taxes, then such taxes are violative of § 171 of the Constitution of Virginia to the extent that they are levied on the going concern value produced by or derived from the physical properties of such corporations, since property of this class and kind is specifically segregated to the localities for taxing purposes. However, as heretofore stated, the *Balto. Steam Packet* case held specifically that the tax involved was a State tax on *intangible* property which is measuerd by the gross receipts derived from the use of the physical properties which are taxed by the localities. Intangible property is not segregated to the localities, but is a proper subject of State taxation.

[4] The appellant also asserts the invalidity of the tax on the ground that the apportionment formula provided in § 58-547 is an improper fraction, its numerator being larger than its denominator, with the result that if the formula were applied as written, the State would subject to the tax more than 100% of the total gross receipts of the appellant, regardless of where earned. And it was mandatory, continues the appellant, to use the formula in computing the tax, because nowhere in the record are the gross receipts from business done in Virginia clearly shown.

The identical type of fraction was contained in § 58-575, prior to the 1952 amendment, and the same argument was used in the *Balto. Steam Packet* case. Neither in that case nor the one now before us was the formula used in computing the tax complained of. The 1950 tax herein involved was paid under a form of protest which included this sentence: "The $3,286,775.70 reported as 'All Receipts earned in Virginia on business passing through, into or out of this

State,' is computed in accordance with an understanding had with the State Corporation Commission of Virginia, and is made without prejudice to the protest of this Company against any tax being levied upon, or measuerd by such receipts." A similar provision was included in the protest filed with the payment of the 1951 tax. The opinion of the Commission states that it has acquiesced in the view that because the density of express traffic is greater in other parts of the country than in Virginia, it would not be fair to the taxpayer to employ the formula based on mileage. The opinion further states that "The statutory formula (with the fraction turned right side up) produces the maximum tax, the formula under which the tax complained of was assessed produces the minimum tax, and the correct measure of receipts actually earned within the State lies somewhere between the two. The taxpayer cannot be heard to complain that the tax is too low." The appellant states in the aforesaid form of protest that it has no way of ascertaining how much of its receipts is applicable to business passing through, into or out of this State. Section 58-547 provides that if the actual receipts from business done in Virginia are not clearly shown, the amount applicable to the tax shall be computed according to the formula. The formula was not used in this case because, in the opinion of the Commission, it would have been inequitable to apply it. Instead a method was used which the appellant prefers to call an "understanding" between it and the Commission which resulted in a tax admittedly lower than it would have been had the formula been used. In fact, the Commission asserts that the tax assessed is less than it would have been even if the appellant had been able to compute its gross receipts resulting from business done in this State. It is not necessary in this case to resort to the formula to compute the tax. Mr. Justice Buchanan in the *Balto. Steam Packet* case called attention to the improper fraction, its numerator being greater than its denominator and said, "That, of course, was not intended." Section 58-575 there referred to has since been amended as pointed out before. The attention of the General Assembly is again called to this matter.

[5] As its final argument the appellant contends that

if the tax is a property tax rather than a license tax appellant's property has no going concern value in the generally accepted sense of that term, hence there is no intangible value on which the tax herein complained of can lawfully be levied. In short, if this is a property tax, appellant has no property of the type subject to it.

All of the appellant's capital stock is owned by sixty-eight railroad companies and it follows that the policies of the appellant, including the fixing of rates, are determined by the stockholding railroad companies, subject of course to governmental regulation.

The appellant's going concern value, or lack of it, was not an issue before the State Corporation Commission. The question was not raised in the appellant's applications, nor was it mentioned at the hearing before the Commission or in the appellant's memorandum submitted for the Commission's consideration. Naturally, it was not discussed in the Commission's opinion and the question has at no time been considered by the Commission. However, Commissioner Catterall said in the opinion of the Commission while discussing intangible property values: "An express company with a nation-wide monopoly enjoys valuable good will. The going concern value if its property greatly exceeds the value of its real estate and trucks. And that going concern value is of course intangible property. The nature of that property has been described by the Supreme Court in *Adams Express Company* v. *Ohio*, 166 U. S. 185, 41 L. Ed. 965 (1897) * * *." Thus, that judicial tribunal on the facts before it held that the express company had a going concern value.

Finally, as we have said before, the steamship companies in the *Balto. Steam Packet* case contended that Code, § 58-575 was invalid because it violated the Commerce Clause. No question was raised in that case about the tax on business beginning and ending in this State. The companies paid the tax on their intrastate business without question. The challenge was directed to the tax on all receipts earned in this State on business passing through, into or out of this State. Thus, the only gross receipts con-

sidered were those derived from interstate commerce. In the instant case the only business taxed under § 58-547 was interstate business, for the appellant had no intrastate business. The issue, therefore, presented in the case of the steamships and the case at bar, is the same and arose under statutes almost identical in language and operation.

Under the decision of the *Balto. Steam Packet* case, it is clear that the provisions of § 58-547 impose a valid property tax on the appellant measured by the gross receipts earned on business done in Virginia.

It follows from what has been said that the orders of the Commission appealed from are affirmed.

Affirmed.

APPENDIX "B"

Article 4 of Title 58 of The Code of Virginia, 1950

§ 58-546. Taxes on property of express companies.—Each and every one of the express companies doing business in this State shall, on or before the first day of October of each and every year, pay to the State and to the several counties, cities and towns of the State wherein they may have taxable properties located, the taxes levied on such property as follows:

(1) The State tax on the intangible personal property (other than shares of stock, and bonds issued by counties, cities and towns or other political subdivisions of this State) owned by every such company shall be at the rate of fifty cents on every one hundred dollars of the assessed value thereof;

(2) The State tax on the money of every such company shall be twenty cents on every one hundred dollars of the assessed value thereof;

(3) There shall be no local levies assessed on such intangible personal property or money;

(4) On the real estate and tangible personal property of every such company there shall be local levies at the same rate or rates as are assessed upon other real estate and tangible personal property located in such localities, the

proceeds of which local levies shall be applied as is provided by law.

The provisions of this section shall apply to the assessment for the tax year nineteen hundred forty-nine and annually thereafter, unless otherwise provided by law. (1919, p. 69; 1926, p. 955; 1928, p. 150; Tax Code, § 219; 1948, p. 923.)

§ 58-547. Annual license tax.—Every such company, for the privilege of doing business in this State, in addition to the annual registration fee and the property tax as herein provided, shall pay an annual license tax as follows:

The tax shall be equal to two and three-twentieths per centum upon the gross receipts from operations of such companies and each of them within this State. When such companies are operating partly within and partly without this State, the gross receipts within this State shall be deemed to be all receipts on business beginning and ending within this State and all receipts earned in this State on business passing through, into or out of this State; provided, unless otherwise clearly shown, such last-mentioned receipts shall be deemed to be that portion of the total receipts from such business which the entire mileage over which such business is done bears to the mileage operated within this State.

The provisions of this section shall apply to the assessment for the tax year nineteen hundred forty-nine and annually thereafter, unless otherwise provided by law. (1991, p. 69; 1926, p. 955; 1928, p. 150; Tax Code, § 219; 1948, p. 924).

§ 58-548. Annual report.—Every company doing an express business in this State on any railroad, steamboat, vessel, bus, truck, aircraft of any kind or on any other kind of vehicle or instrumentality of transportation shall report annually on or before the first day of May to the Commission all of its real and personal property of every description in this State belonging to it as of the beginning of the first day of January preceding showing particularly in what city, town, county and school district the property is located and classifying the same under the following heads:

(1) All of its real and personal property of every description in this State showing the cost and market value of such property;

(2) The total number of miles operated within and without this State for the year ending December thirty-first next preceding;

(3) The gross receipts from operation entirely within this State and if operations are party within and party without this State the entire gross receipts from operation for the year ending December thirty-first next preceding;

(4) Any and all other information, in such manner and in such detail as the Commission shall require. (1928, p. 148; 1942, p. 408; Tax Code, § 218.)

§ 58-549. Assessment of value of property.—The Commission shall, after thirty days' notice previously given by it to the president or other proper officer, assess the value of the property of each of such companies.

Should any such company fail to make the report required by this article on or before the first day of May the Commission shall, at such time as it may elect, upon the best and most reliable information that can be procured, assess the value of the property of the company within this State and shall ascertain the information required herein. In the execution of such duty the Commission shall be authorized and empowered to take testimony, summon and compel the attendance of witnesses and send for persons and papers. (1928, p. 149; 1942, p. 409; Tax Code, § 218.)

§ 58-550. Copies of assessment for Comptroller and company.—A certified copy of the assessment when made shall be immediately forwarded by the clerk of the Commission to the Comptroller and to the president or other proper officer of each such company. (1928, p. 149; 1942, p. 409; Tax Code, § 218.)

§ 58-551. Copy of assessment for local authorities.—The clerk of the Commission shall furnish to the council of every city and town and to the board of supervisors or other governing body of every county wherein the property belonging to the company is situated a certified copy of the assessment made by the Commission of such company's property. The assessment shall definitely show the character of the property and its value and the location for the

purpose of taxation in each city, town, county and district, so that city, town, county and district levies may be imposed upon the same. (1928, p. 149; 1942, p. 409; Tax Code, § 218.)

§ 58-552. Payment of tax.—Such company shall pay into the State treasury by the first day of October following the assessment the taxes assessed against it. (1928, p. 149; 1942, p. 409; Tax Code, § 218.)

§ 58-553. No other taxes on express companies.—The amount of taxes and licenses imposed by this article and authorized to be imposed shall be in lieu of all other taxes and licenses, State, County and municipal, upon all the property, franchises and privileges of such companies; provided, that nothing herein contained shall exempt the companies from the payment of any motor vehicle license or any motor vehicle fuel tax, heretofore or hereafter imposed by law. (1919, p. 69; 1926, p. 955; 1928, p. 150; Tax Code, § 219; 1948, p. 924.)

§ 58-554. Penalty for failure to pay.— Any such company failing to pay such taxes into the State treasury within the time herein prescribed shall incur a penalty thereon of five per centum, which shall be added to the amount of the taxes. (1928, p. 149; 1942, p. 409; Tax Code, § 218.)

§ 58-555. Penalty for failure to report.—Any such company failing to make the report required by § 58-548 within the time herein prescribed shall be liable to a fine of not less than twenty-five dollars nor more than one hundred dollars for each day such company may be in default in making such report, the fine to be imposed and judgment entered therefor by the Commission after thirty days' notice to any such defaulting company to appear before the Commission and show cause, if any, against the imposition of such fine, subject to appeal to the Supreme Court of Appeals of Virginia. (1928, p. 149; 1942, p. 409; Tax Code, § 218.)

APPENDIX "C"

COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

Application of RAILWAY EXPRESS AGENCY, INCORPORATED

For refund of license taxes.

Cases Nos. 10,629 and 10,767

Opinion, CATTERALL, *Commissioner:*

Railway Express Agency, Incorporated is a Delaware corporation, and Railway Express Agency, Incorporated, of Virginia, is a Virginia corporation. The Delaware corporation owns the stock of the Virginia corporation and since March 12, 1932, the Virginia corporation has carried on the intrastate express business in Virginia.

Since the creation of the Virginia company, both companies have paid the annual license tax imposed by § 58-547 of the Code, but the Delaware company has taken the position that the tax on it violates the commerce clause of the federal constitution. In 1930 (before the creation of the Virginia company) it raised this question in a petition to the State Corporation Commission. The Commission held the tax constitutional but reduced the amount of the tax measured by gross receipts from interstate business by about $41,000. Annual Report 1933, p. 9. The company did not appeal from that order, but for many years it has paid its taxes under protest, and, when the Supreme Court of the United States on March 26, 1951, rendered its decision in *Spector Motor Service* v. *O'Connor*, 340 U. S. 602, the company was encouraged to try again to upset the tax.

By that time, more than three months had elapsed since it had received the certified copy of the assessment for 1950, and it was too late to apply for a refund under § 58-672. It applied under § 58-1122. The petition in the second case (for 1951) was filed within the three months' period.

In Case No. 10,629 we have to decide whether we have jurisdiction to entertain the petition, or whether the petition was filed too late. On the constitutional question, the issues in both cases are, of course, the same; and both cases were heard together.

The question of jurisdiction in Case No. 10,629.

We have come to the conclusion that the petition in Case No. 10,629 was filed too late and that the Commission has no jurisdiction to pass on it.

Title 58 of the Code covers the subject of taxation and Chapter 12 of that title deals with the taxation of public service corporations, although the chapter includes some taxpayers that are not corporations and some corporations that are not public service companies.

Article 4 of that Chapter imposes the taxes on express companies and Article 16 covers the subject of erroneous assessments. All references in this opinion to "articles" will refer to articles in Chapter 12 of Title 58.

Article 16, in § 58-672, provides for relief from erroneous assessments on "any transportation company, transmission company or other public service corporation."

As used in the constitution and laws of Virginia, "transportation company" is a word of art that does not have its ordinary dictionary meaning. For example, a common carrier by motor vehicle is not a transportation company. An express company is a transportation company.

Sec. 153 of the constitution says:

> ". . . the term 'transportation company' shall include any . . . express company . . ."

Therefore, the petitioner is included in Article 16 as specifically as if Article 16 used the words "express company;" and Article 16 is a specific law under which express companies may apply for relief from erroneous assessments made by the State Corporation Commission.

Section 58-1122, on which petitioner relies, is a general statute for the correction of taxes assessed by the State Corporation Commission, and it allows a petition to be filed

at any time within one year *after* the tax complained of has been *paid*. The words to be construed are:

> ". . . unless and except as otherwise specifically provided . . ."

Section 58-1122 provides a catchall for cases not otherwise specifically provided for. It gives rights of review to individuals as well as corporations and to corporations that are not public service corporations. Our interpretation of the legislative intent is that a petition that can be filed under Article 16 cannot be filed under § 58-1122. So far as we know, the question now raised by petitioner has never been raised before. In the past, all petitions that could be filed under Article 16 were filed under that article.

The petition filed by petitioner in Case No. 4037, reported in our 1933 Annual Report at page 9, was filed under Section 235 of the Tax Code (Acts of 1928, p. 164), which is the source of Article 16. Proceeding under that section, petitioner got a refund of over $40,000, and yet the burden of petitioner's argument seems to be that that section does not relate to refund claims. At page 11 of its brief, petitioner says:

> "But there are not any other specific statutory provisions *relating to the refund of license taxes paid by express companies.*"

At page 12 of its brief, petitioner says:

> "Section 58-672 . . . does not specifically provide for *a claim for refund* of taxes *already paid.*"

Section 58-672 does not use the word "refund." It uses the words "review and correction." The only way to correct an assessment that has been paid is to refund the money, and Article 16, in § 58-675, expressly provides for the refund of taxes already paid. It says:

> ". . . appropriate relief shall be granted, including the right to recover from the State or local authorities, or both, as the case may be, any excess of taxes that

may have been paid. The order of the Commission shall be enforced by mandamus, or other proper process, issuing from the Commission."

The writ of mandamus is a common law writ to compel a public officer to perform a ministerial duty. It does not issue to compel a private corporation to pay a tax, but does issue to compel a public officer or municipal corporation to refund a tax. Article 16 is a specific statute providing a complete remedy at law pursuant to which express companies can apply for and get refunds.

Petitioner argues that this remedy is not specifically provided for express companies because Article 16 does not contain the words "express companies." And it points to § 58-540 in Article 2 which mentions railway and canal companies and to § 58-616 in Article 10 which mentions water or heat, light and power companies.

Section 58-540, relating specifically to railways and canals, and § 58-616, relating specifically to water or heat, light and power companies, relate solely to relief in the Circuit Court of the City of Richmond. Neither section provides for relief on application to the State Corporation Commission, and both are unconstitutional. § 58-540 conflicts with Sec. 180 of the Constitution which provides that a railway or canal company "may, according to such course of procedure as may be prescribed by law, apply for relief first to the State Corporation Commission and *then* to the Circuit Court of the City of Richmond." § 58-616 conflicts with Sec. 156(d) of the Constitution which forbids any circuit court to "review, reverse, correct or annul any action of the Commission, within the scope of its authority."

Article 16 covers "any transportation company, transmission company or other public service corporation." Therefore railway and canal companies, and water or heat, light and power companies can seek relief under Article 16. § 58-676 (in Article 16) provides that all of them, *after review by the Commission*, can go to the Circuit Court of the City of Richmond. That provision appears to be unconstitutional as to all except railway and canal companies (Const. Sec. 180). § 58-677 (in Article 16) provides that all

parties may go to the Circuit Court of the City of Richmond "for relief from any original assessment without having first applied to the Commission for a review thereof." That section appears to be inconsistent with Sec. 156(d) of the Constitution.

Accordingly, railway, canal, water, heat, light, power and express companies are all specifically provided for in Article 16. All may petition under Article 16 and all must petition under Article 16. The argument based on the fact that express companies are not mentioned by name in Article 16 applies equally to all the others, because none of them is there specifically mentioned by name. A statute that applies specifically to all transportation companies applies specifically to every transportation company. In legislating for a class, the legislature does not have to name every member of the class in order to make the law apply specifically to every member of the class. The class to which Article 16 applies consists of public service companies whose real estate and tangible property are assessed by the Commission, who state franchise or license taxes are assessed by the Commission, and to whom the Clerk of the Commission is required by law to forward a certified copy of the assessment. The three months begins to run "after receiving a certified copy of such assessment of value or tax." The taxpayer has actual notice of the assessment before time begins to run against him.

Such taxes are assessed by the Commission after giving the taxpayer thirty days' notice that the assessment is to be made. See the following sections:

Railway and canal	§ 58-529
Express companies	§ 58-549
Freight car companies	§ 58-558
Sleeping cars	§ 58-566
Steamship lines	§ 58-582
Pipe lines	§ 58-590
Water, heat, light and power	§ 58-610
City bus lines	§ 58-647

The notice specifies the date when a hearing will be held on the assessments in the courtroom of the Commission.

Each taxpayer is given an opportunity to be heard. After the hearing the taxes are assessed by order of the Commission and copies of the assessments are printed and sent to the State Comptroller and to every city, town and county, and to each taxpayer. The sections of the Code relating to the certification of these assessments by the Clerk of the Commission are:

	To Comptroller and taxpayer	To cities, towns and counties
Railroads	§ 58-530	§ 58-538
Express companies	§ 58-550	§ 58-551
Freight cars	§ 58-559	None
Sleeping cars	§ 58-567	None
Steamships	§ 58-572	§ 58-573
Tel. & tel.	§ 58-583	§ 58-584
Pipe lines	§ 58-590	§ 58-592
Water, etc.	§ 58-611	§ 58-612
City bus	§ 58-648	§ 58-650

Taxpayers falling in this class are thus notified in advance of the assessment that is about to be made, and each taxpayer receives an invitation to state his objections to the assessment before it is made. After the assessments have been made and printed, copies are certified to all the interested parties. Article 16 then gives each taxpayer three months in which to file a petition for a review and correction of any item that he takes exception to. Article 16 provides the specific method for review and correction of the taxes thus assessed.

Petitioner bases two arguments on the wording of § 58-1122 on the mistaken assumptions (1) that the Commission assesses license taxes only against public service companies, and (2) that if the *res judicata* clause in § 58-1122 does not apply to proceedings under § 58-672, there is nothing else for it to apply to.

1. The first of these arguments is stated on page 10 of petitioner's brief:

> "The General Assembly must have intended for at least some corporations to have a right to claim a refund of license taxes under Section 58-1122; otherwise that part of the statute would be meaningless and

presumably would not have been adopted by the General Assembly. Since the Commission assesses those taxes only against public service corporations it is apparent that the relief granted to such corporations by Section 58-672 cannot be exclusive."

The Commission assesses many taxes besides public service company taxes. Some of these taxes are called license taxes and are license taxes; other are not called license taxes and are license taxes.

For example, the taxes imposed by Articles 12 and 13 are called "road taxes" and are license taxes. If a motor carrier fails to pay these taxes, we revoke his privilege to use the highways.

The taxes imposed on insurance companies by § 58-486 are called license taxes and are license taxes. They are assessed by the Commission under § 58-497. If they are not paid, the Commission revokes the taxpayer's license to do business (§ 58-498).

These are examples of taxpayers who can claim refunds under § 58-1122.

The so-called "license" taxes imposed on express companies are the same kind of taxes as the "franchise" taxes imposed on railroads. Neither of them is a license tax, because neither is exacted as a condition of carrying on the business. A license tax is an excise tax that must be paid as a condition of carrying on a business or exercising a privilege.

2. The second of these arguments is stated on page 12 of petitioner's brief:

> "Section 58-1122 provides that a refund of tax cannot be obtained 'after a formal adjudication in a proceeding in which the right of appeal existed and was not taken.' She quoted language must refer to a proceeding that could be brought under a section other than Section 58-1122 in which the decision was against the taxpayer; . . ."

The quoted language is merely a statement of the doctrine of *res judicata*. Many taxes assessed by the Commission are certified to the Comptroller for collection. If such a tax

is not paid, the Comptroller causes suit to be brought against the delinquent taxpayer. If the decision in that suit is against the taxpayer, he obviously cannot pay the tax and thereafter apply for a refund. The same principle applies to cases in which the Commission imposes penalties on taxpayers under §§ 58-635 and 58-642. If the penalty is imposed for failure to pay taxes, it would be a bar to an application for a refund of the same taxes. All decisions of the State Corporation Commission can be appealed.

Case No. 10,629 must be dismissed because the petition was not filed in time. We turn now to the constitutional question that is properly raised in Case No. 10,767.

The Constitutional Question

This case is governed by *Commonwealth* v. *Baltimore Steam Packet Co.*, 193 Va. 55, appeal dismissed, 96 L. Ed. Adv. Ops. 578 (April 21, 1952).

Article 7, taxing steamship companies, and Article 4, taxing express companies, are so much alike that no distinction can be drawn between them. Petitioner, realizing that the decision of that case would control this case, filed a brief *amicus curiae* in that case. In that brief, petitioner said (p. 2):

> "In view of the importance of the Court's ruling, both to the Appellees and to many other corporations operating in Virginia either entirely or partly in interstate commerce, Railway Express thought it in the public interest that this Court should have before it a full presentation of its viewpoint on the problems involved."

The Supreme Court of Appeals, at page 68 of its opinion said:

> "In the case of steamship companies (and also express companies) the tax is denominated a license tax, and the requirement is that every such company shall pay it 'for the privilege of doing business in this State, in addition to the annual registration fee and property tax.' But what it is called is not necessarily what it is."

Except for poll taxes, all taxes are either excise taxes or property taxes. The reason it is necessary to decide whether a particular tax is an excise tax or a property tax is because of constitutional limitations. The constitution of the United States, for example, provides, in effect, that all federal taxes on property must be apportioned among the several states in accordance with their respective populations, and that all federal excise taxes must not be so apportioned, but must be uniformly applied throughout the United States. Accordingly, the constitutionality of every federal tax depends on whether it is an excise tax or a property tax. Beginning with *Hylton* v. *United States*, 1 L. Ed. 556 in 1796, nearly every federal tax has been contested in the Supreme Court on the ground that it was not properly apportioned or was not properly uniform. In the great case of *Pollock* v. *Farmers Loan & Trust Co.*, 158 U. S. 601, 39 L. Ed. 759 (1895) the court held, five to four, that a general income tax was a property tax as to income from property and an excise tax as to income from earnings. That decision was reversed in 1913 by the 16th Amendment, and has never commanded universal respect. The Court of Appeals of Virginia refused to follow it in 1936 in *Hunton* v. *Commonwealth*, 166 Va. 229.

Beginning with decisions rendered by Chief Justice Marshall the Supreme Court has held that the commerce clause, which says that Congress shall have power to regulate interstate commerce, means that the states are forbidden to regulate interstate commerce. Since those decisions are based more on considerations of policy than of logic, they cannot be carried to a strictly logical conclusion; and ever since *Cooley* v. *Board of Wardens*, 12 How. 299, 13 L. Ed. 996 (1851), it has been recognized that the states are free to regulate some parts of interstate commerce, namely those parts that the Supreme Court thinks it desirable that the states should be free to regulate. Proceeding from the field of regulation to the field of taxation, the Supreme Court has decided that a state tax on interstate commerce is a state regulation of interstate commerce and is void if it goes too far. It is interesting to look at the actual words of the constitution and then contemplate the edifice the court has built on them.

Those words are:

> "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . ."

With only those words to guide it the court has struck down countless state taxes on the ground that they impede the free flow of commerce more than they should, and has upheld countless state taxes on the principle that "interstate commerce must pay its way."

In this field of constitutional law the court itself, without any words in the constitution expressing or implying any such distinction, has drawn a line between excise taxes and property taxes. If the tax is an *excise* tax, the court may or may not strike it down, but if the tax is a *property* tax all is well: state taxes on property *used* in interstate commerce are upheld so long as the property is located in the taxing state. State property taxes that get by the due process clause do not run into trouble with the commerce clause.

So, when the Virginia Supreme Court of Appeals held that the license taxes on steamship and express companies were property taxes, all danger of an adverse decision in the Supreme Court of the United States was averted, and that court dismissed the appeal without comment, presumably on the ground that no federal question worth discussing was involved. In *Commonwealth* v. *Baltimore Steam Packet Co.*, 193 Va. 55, the court said (p. 70):

> "Likewise, in the 1941 Annual Report of the Commission, page 41, it was said:
>
> " 'Therefore, in making the assessment of the physical properties, we are assessing the tracks, track structures, cuts, fills, tunnels, bridges, and the like, or, in other words, the bare bones of the property, denuded of the intangible elements of value which may be attributable to them. It should also be borne in mind that the franchise value is assessed at 100%.'
>
> "It thus appears that the physical properties of these appellees, according to this practice, were assessed on the basis of their dual values, the dead value, or 'the

bare bones,' to be taxed by the locality, and the live, or going concern value, to be taxed by the State for the protection and services rendered by it. That the going concern value is thus taxable, although the basic items of property on which it arises are used in interstate commerce, is established by numerous decisions of the Supreme Court, as set out above. This tax on the going concern value is in effect an increase of the *ad valorem* rate, *Memphis Natural Gas Co.* v. *Stone, supra.* In its derivation and substance it is a tax on an element of value of the physical properties not reached by the tax levied by the localities, but reserved to the State and not otherwise taxed. It is, therefore, a tax which is not prohibited by the Commerce Clause."

Commenting on this decision, the April, 1952, Virginia Law Review at page 423 remarks:

"It appears that the Court in the instant case preferred to sustain the tax on the ground that it was an *ad valorem* tax rather than on the ground that it was a privilege tax on a business not exclusively interstate in character. If the mental gymnastics employed by the Court are questioned, it may only be answered that this is not the first time such an approach to the problem has been used. If the Spector case is an indication of a return to the 'direct-indirect' test as to state taxation of interstate commerce, then the Court was wise in its choice of grounds."

We deprecate this suggestion that our highest court engaged in "mental gymnastics" to get around the *Spector* case. Long before the *Spector* case was heard of the franchise or license taxes on public service companies were regarded as property taxes.

Sec. 170 of the constitution provides:

"The General Assembly . . . may impose State franchise taxes, and in imposing a franchise tax may, in its discretion, make the same in lieu of taxes upon *other property*, in whole or in part, of a transportation, industrial or commercial corporation."

If the framers of the constitution had not regarded franchise taxes as taxes on *property*, they could not have used the words "*other* property."

(§ 58-553 makes the express company tax in lieu of other taxes. By virtue of that section express companies escape the tax on their rolling stock).

The franchise or license taxes imposed on public service companies are taxes on *intangible* property.

In *Commonwealth* v. *Baltimore Steam Packet Co.*, 193 Va. 55 at page 69 the court said:

> "We said in that opinion that the existing method of assessing the properties of the utility involved in that case was developed from the system prescribed for the assessment of railroad properties, and we quoted from a letter relating to railroad assessments written by Commissioner Epes, afterwards a justice of this court, saying in part:
>
> " 'The value of these physical properties, which the Commission has tried to ascertain as the 100% basis to which to relate its assessments, is the actual value as of January 1, 1927, of the land and other physical properties of the railroad company exclusive of any franchise value, good will, "going concern value," "cost of establishing the business," or other "intangible" value of the company.' "

An express company with a nation-wide monopoly enjoys valuable good will. The going concern value of its property greatly exceeds the value of its real estate and trucks. And that going concern value is of course intangible property. The nature of that property has been described by the Supreme Court in *Adams Express Company* v. *Ohio*, 166 U. S. 185, 41 L. ed. 965 (1897) as follows:

> "But this contention practically ignores the existence of intangible property, or at least denies its liability for taxation. In the complex civilization of today a large portion of the wealth of a community consists in intangible property, and there is nothing in the nature of things or in the limitations of the Federal

Constitution which restrains a state from taxing at its real value such intangible property."

* * * * * * *

"The first question to be considered therefore is whether there is belonging to these express companies intangible property—property differing from the tangible property—a property created by either the combined use or the manner of use of the separate articles of tangible property, or the grant or acquisition of franchises or privileges, or all together. To say that there can be no such intangible property, that it is something of no value, is to insult the common intelligence of every man."

* * * * * * *

"But where is the situs of this intangible property? The Adams Express Company has, according to its showing, in round numbers $4,000,000 of tangible property scattered through different states, and with that tangible property thus scattered transacts its business. By the business which it transacts, by combining into a single use all these separate pieces and articles of tangible property, by the contracts, franchises, and privileges which it has acquired and possesses, it has created a corporate property of the actual value of $16,000,000. Thus, according to its figures, this intangible property, its franchises, privileges, etc., is of the value of $12,000,000 and its tangible property of only $4,000,000. Where is the situs of this intangible property? Is it simply where its home office is, where is found the central directing thought which controls the workings of the great machine, or in the state which gave it its corporate franchise; or is that intangible property distributed wherever its tangible property is located and its work is done? Clearly, as we think, the latter."

At the 1952 session of the General Assembly, Article 7, imposing taxes on steamship carriers, was rewritten; and

petitioner argues that the amendment amounts to a legislative declaration that the Supreme Court of Appeals had misinterpreted the intent of the legislature. At page 27 of its brief petitioner says:

> "Applicant is of course aware of the decision of the Supreme Court of Appeals in the *Baltimore Steam Packet Company* case, supra, that a quite similar tax on steamship and other water carriers was not a privilege tax but a property tax on the going concern value of such companies. This Honorable Commission would undoubtedly be bound by that decision in applying the statute to any other *steamship* company except, for the action of the General Assembly at its 1952 Session in amending the gross receipts tax on such companies (Sec. 58-575 of the Code of Virginia) so as to provide that such tax should apply *only* to gross receipts derived from *intrastate* commerce in Virginia. The effect of this amendment is to nullify at the earliest opportunity the decision of the Court of Appeals in the *Baltimore Steam Packet Company* case and clearly establishes the legislative *intent* that the tax there involved was never intended to apply to gross receipts earned from *interstate* commerce. Applicant therefore respectfully submits that the action of the General Assembly in amending Section 58-575 of the Code of Virginia (subsequent to and in the light of the opinion of the Supreme Court of Appeals in the *Baltimore Steam Packet* case) definitely establishes the *nature* of that tax to be a *privilege* tax, rather than a property tax. *The tax on express companies under consideration here is so similar as to be subject to the same interpretation.*"

This argument about legislative "intent," when broken down into its component parts, asserts three things:

1. The legislature wanted to "nullify" the court's decision. The word "nullify" is used to create the impression that the legislature was trying to wipe the decision off the books retroactively.

2. The tax was "never intended to apply to gross re-

ceipts from *interstate* commerce." This is saying that the legislature amended the law for the purpose of changing its meaning retroactively. The argument asserts that although the statute expressly covered interstate commerce, the legislature never intended it to cover interstate commerce.

3. The legislature, having learned that the tax is constitutional because it is a property tax, quickly amended the law for the purpose of expressing its desire that the Court of Appeals hold unconstitutional the tax on express companies.

Of course, in seeking the "intent of the legislature," we are not looking for what was in the back of the minds of the legislators. The intent of the legislature must be found in the words used by the legislature, and the object of interpretation is to discover the *meaning* of those words.

The words in question are:

> ". . . all receipts on business beginning and ending within this State and all receipts earned in this State on business passing through, into or out of this State . . ."

Petitioner asks us to hold that the General Assembly, by amending the statute in 1952, intended to say that its words "business passing through, into or out of this State" were never intended to describe anything but intrastate movement. Such an interpretation is impossible.

Petitioner asks us to hold that the 1952 amendment was intended to be retroactive and to "nullify" the decision of the Court of Appeals. If the decision were really nullified, it could not be enforced, and the steamship companies would not have to pay the 1950 and 1951 taxes. But the new statute (Chapter 486, Acts of 1952) concludes:

> "These sections as amended shall go into effect as of the beginning of the first day of January, nineteen hundred fifty-three."

Not only has the legislature not nullified the 1950 and 1951 assessments: it has declared that the taxes shall be assessed for 1952, and has thereby expressed its agreement

with the court that the tax measured by interstate earnings is valid.

This amendment was not adopted for the purpose of expressing disapproval of the court's interpretation of the law but for the purpose of encouraging navigation in the great port of Hampton Roads. That was a subject prominently before the 1952 General Assembly. The legislature toured Hampton Roads in a body and passed a law (Chap. 61, Acts of 1952) to create the "Virginia State Ports Authority" to encourage the development of the ports. As one means of promoting that public policy, the legislature reduced the taxes on steamship lines beginning with the year 1953. Since the Court of Appeals had just held that the license tax imposed by § 58-575 was not a privilege tax, the General Assembly, when it amended § 58-575, left out the word "privilege" for the purpose of making it clear that it agreed with the holding of the court that these taxes are not in fact privilege taxes. Petitioner's argument that we should now hold that the legislature was trying to make unconstitutional the franchise and license taxes on which so large a part of the state's revenue depends is as topsy-turvy as the upside-down fraction in the apportionment formula.

Unquestionably, the fraction described in § 58-575 for steamship lines and in § 58-547 for express companies is upside down. Many people find it confusing to describe ratios and this mistake is not uncommon. However, it is clear in both sections that the legislature meant to tax only a *part* of the total gross receipts. The legislature could not have intended to tax *more* than the total gross receipts. If one-tenth of the gross receipts were earned in Virginia, the legislature intended to measure the tax by one-tenth of the gross receipts and not by ten times the gross receipts. The language of the steamship company fraction is more defective than that of the express company fraction. § 58-575 uses the words:

". . . that *proportion* of the total receipts . . ."

§ 58-547 uses the words:

". . . that *portion* of the total receipts . . ."

Thus, the express company formula contains within itself a word stating the intent of the legislature to tax only a *portion* of the gross receipts.

The actual measure of the tax is stated in § 58-547:

> "When such companies are operating partly within and partly without this State, the gross receipts within this State shall be deemed to be all receipts on business beginning and ending within this State and all receipts earned in this State on business passing through, into or out of this State; . . ."

The proviso:

> ". . . unless otherwise clearly shown, such last-mentioned receipts shall be deemed to be that portion of the total receipts . . ."

merely points out a method of computing the amount of receipts earned in Virginia. The taxing statute is complete in itself without the proviso, and the proviso itself directs that the formula be not used if it be clearly shown that application of the formula would result in taxing receipts that could not properly be deemed to have been earned within the State.

Heretofore, the Commission has acquiesced in the view that, because the density of express traffic is greater in other parts of the country than in Virginia, it would not be fair to the company to employ the formula based on mileage. In recent years the Commission and the company have by mutual agreement employed a rough and ready formula that, because of changing conditions, is getting out of line and will have to be revised. The statutory formula (with the fraction turned rightside up) produces the maximum tax, the formula under which the tax complained of was assessed produces the minimum tax, and the correct measure of receipts actually earned within the State lies somewhere between the two. The taxpayer cannot be heard to complain that the tax is too low.

The *Spector* case does not invalidate any property taxes but only some excise taxes. Since the tax complained of is a property tax and not an excise tax, it is unnecessary to

decide whether the Delaware corporation is doing an intrastate business in Virginia through the agency or instrumentality of the Virginia corporation.

A corporation is an imaginary person created under and by virtue of a statute that gives it eternal life and its stockholders limited liability. The command of the statute is that this fictitious creature shall be treated as if it were real. When courts, as they frequently do, ignore the corporate entity in order to achieve justice, they necessarily ignore the words of the statute creating the corporation, on the theory that the legislature could not have intended the corporate fiction to be used for a wrongful purpose. The Virginia Court of Appeals in *Beale* v. *Kappa Alpha*, 192 Va. 382 at 399, summed up the law on the subject by quoting from a Texas case:

> " '. . . Just when a corporation will be regarded as the adjunct, creature, instrumentality, device, stooge, or dummy of another corporation is usually held to be a question of fact in each case. As above stated the general rule is that the separate corporate entity of corporations will be observed by the courts, even though one may dominate or control another, or may treat it as a mere department, instrumentality, agency, etc.; and courts will disregard the separate legal identities of the corporation only when one is used to defeat public convenience, justify wrongs, protect fraud or crime of the other.' "

The Delaware corporation created and uses the Virginia corporation not for the purpose of getting around the law but for the purpose of obeying the law. We therefore hold that the corporate entity cannot properly be ignored and that the Delaware corporation is engaged only in interstate business in the State of Virginia. Since the tax is a property tax it is constitutional even though the taxpayer does no intrastate business.

Hooker, *Chairman*, and King, *Commissioner*, concur.